United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2085

ORIGINAL

To be argued by
IRVING ANOLIK

In The

United States Court of Appeals

For The Second Circuit

B
P/S

UNITED STATES OF AMERICA, ex rel. IRVING ANOLIK, on behalf of SHELDON SELIKOFF,

Petitioner-Appellee,

- against -

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PETITIONER-APPELLEE

IRVING ANOLIK
Attorney for Petitioner-Appellee
225 Broadway
New York, New York 10007
(212) 732-3050

(9430)
LUTZ APPELLATE PRINTERS, INC.
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UNITED STATES OF AMERICA, ex rel.
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Petitioner-Appellee,

-against-

COMMISSIONER OF CORRECTION OF THE
STATE OF NEW YORK,

Respondent-Appellant.

- x

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

PETITIONER-APPELLEE'S BRIEF

Petitioner-appellee, Sheldon Selikoff, submits this brief in opposition to respondent-appellant's brief and the brief of the intervenor, The People of the State of New York, who are seeking to overturn the order and decision of United States District Judge Dudley Bonsal of the Southern District of New York, who granted the writ of habeas corpus and ordered the release of petitioner.

This Court denied a stay of the release of petitioner on bail. Petitioner, therefore, is presently at liberty upon bail.

THE FACTS

The appellant and the intervenor have purported to give this Court the facts. We think that it is appropriate, however, to emphasize that when petitioner Selikoff interposed his pleas of guilty to two of four indictments in satisfaction of all four indictments that contrary to certain practices, no reservation was "articulated" by County Court Judge Burchell indicating that his promise of no incarceration was in any way conditional.

There is a practice in the state courts which many judges follow and which we believe even Judge Burchell follows, whereby plea bargains are expressly made conditional upon the outcome of a probation report or presentence report, the condition ordinarily being that the plea will be withdrawn and the defendant put back in status quo ante if the presentence or probation report comes back unsatisfactory.

We emphasize that the facts of the case herein contain no such contingency or condition.

County Court Judge Burchell, sua sponte, decided not to honor his promise of no incarceration at the time of sentence. Neither the District Attorney's office, nor the Probation Department made any request that the promise be broken.

Moreover, there were extensive discussions over a pro-

tracted period of time among the Judge, the prosecution (including high echelon representatives of the District Attorney's office), and the defense counsel, before any plea bargain was entered into.

At the time of sentence, the Trial Judge did not seek to have Selikoff withdraw his pleas of guilty only with respect to the two open indictments upon which he was to be sentenced, but also sought the reinstatement of the two indictments which had been dismissed.

It should be borne in mind that Selikoff pleaded guilty to second degree grand larceny in full satisfaction of 38 counts in three separate indictments arising out of a complicated real estate transaction. Defendant also pleaded guilty to obscenity in the second degree in satisfaction of another multi-count indictment.

Defendant knew that if he were forced to withdraw his pleas of guilty and consent to the reinstatement of all charges, that he would have to face trial on many counts in four separate indictments.

Whereas Selikoff was originally indicted with others, the trial involving those other persons had already taken place and Selikoff would have to have proceeded to trial alone, and not as one of several defendants. All the virulence of the

charges would thus be directed at Selikoff rather than fragmented among several defendants.

The dispositions of the co-defendants, namely Ruben Posner, Herbert Posner, Guy Cocozza, Thomas Dunn, and Arnold Mann, are set forth on page 3 of the intervenor's brief and we assume that their information is correct as to those individuals.

It is obvious that had there been no trial of any of the co-defendants, that there would never have been any suggestion by the Trial Judge that the pleas of guilty be withdrawn, since it is not alleged that the probation or presentence report recommended such action.

The Trial Judge presided at the trial of the other defendants who actually went to trial and decided for himself that he preferred not to keep the promise he had made. <u>It is important to note that there is no suggestion in this case that there was any misrepresentation to the Trial Judge on the part of the prosecution or the defense with respect to the plea bargain which was entered into</u>.

Thus the facts as related by the appellant and the intervenor tell part of the story, but the foregoing are important aspects which must be borne in mind.

ARGUMENT

POINT I

THE COURT BELOW WAS CORRECT IN DIRECTING THAT THE WRIT OF HABEAS CORPUS BE GRANTED. THAT COURT, HOWEVER, SHOULD HAVE GONE FURTHER AND DIRECTED THE ENFORCEMENT OF THE PLEA BARGAIN AS MADE SINCE THE PLEA BARGAIN WAS UNCONDITIONAL.

The author of this brief, by coincidence, argued the leading case on plea bargaining in this country, Santobello v. New York, 404 U.S. 257. In addition, the author of this brief argued a number of other cases involving plea bargaining in the State of New York, such as People v. Esposito, 32 N.Y. 2d 931; People v. DiGiacomo, 40 App. Div. 2d 689, and other cases. We are therefore familiar with developments in this area.

The cases on plea bargaining, up to the Selikoff case, for the most part reveal that the Courts took the position that the plea bargain must be enforced as made. This is evident from the fact that upon remand of the Santobello case, People v. Santobello, 39 App. Div. 2d 654 (1st Dept.), the Appellate Division of the Supreme Court, First Department, ruled that Santobello had no right to withdraw his plea of guilty but that on the contrary, the plea agreement had to be enforced as made. The Appellate Division therefore, citing the case of People v. Keehner, 28 App.Div. 2d 695, aff'd. 25 N.Y.2d 884, determined

that due process required the specific performance of the promise (A 50).*

The companion case to Selikoff, namely People v. Robert Davidson, which was argued at the same time as Selikoff in the New York Court of Appeals, is presently sub judice before District Judge John Cannella on a federal writ of habeas corpus (A 55 et seq.).

Again it should be noted that the author of this brief also handled the Davidson Case. We reveal this background merely to demonstrate that it is from a background of substantial experience in this field that the petitioner maintains that the only logical interpretation of Santobello is that the Supreme Court intended that the defendant be given the option of whether or not he wished to have the plea of guilty enforced or not, absent misrepresentation.

In Santobello, it should be noted that Justice Douglas concurred with the unanimous determination for reversal but took the position that great or controlling deference should be paid to the wishes of the defendant. We believe that a fair reading of the Santobello opinion in the Supreme Court of the United States indicates that the plea bargain, at the

* Numerals in parentheses preceded by the prefix "A" refer to pages of the appellant's appendix.

very least, should have been enforced as made.

A unilateral and perhaps visceral desire to vitiate the plea bargain ought not be tolerated since otherwise plea bargaining is a meaningless exercise in futility.

The dissent in the Appellate Division in the instant case noted that the failure to live up to a promise as made in effect rendered the plea bargain nugatory. Justice Gulotta (now Presiding Justice) noted that "The law must be fair and there is little justice in adopting or pursuing a rule which does not apply equally to the People and to the defendant" (A 86).

(A)

THE DEFENDANT'S RIGHT TO SEEK TO VACATE A PLEA OF GUILTY BECAUSE OF A MISUNDERSTANDING, IS NOT RECOGNIZED BY THE NEW YORK COURTS.

The rule now enunciated in the Selikoff case in the New York Court of Appeals in essence means that one party to the plea bargain, namely the Presiding Judge who accepted it, is generally able to circumvent the bargain at will. The defendant, however, is ordinarily bound and does not have equal right to seek a vacation of his plea bargain if subsequent events should prove that it was an unwise choice.

In the case at bar, although no misrepresentation or fraud by the defendant or the prosecution was alleged, the

Trial Court in the County of Westchester arrogated to itself the right to order that the plea of guilty be withdrawn or that the promise be voided on pain of jail.

The Court below, that is the District Court, took the position that the County Judge should have vacated the pleas of guilty "sua sponte". We assume that this means that only those charges which have not already been dismissed would be reinstated.

Without petitioner's consent, we maintain that the dismissed charges under no circumstances could be reinstated. We maintain that in essence this would subject the petitioner to double jeopardy as is set forth in pages A30 through A 39 of the appellant's appendix.*

The effect of ordering, sua sponte, the vacating of the plea of guilty, would not have the same effect as a consent to the reinstatement of the dismissed indictments since that would require an actual waiver of rights. We analogize the situation herein to that of double jeopardy or added punishment in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution (see A 35 - A 39).

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* The petitioner incorporates by reference the arguments reproduced in the appendix herein (A 26 - A 52), which constitutes the brief submitted to the Court below and we maintain need not be reproduced here since it is already reproduced in the appendix.

We do not agree that due process would have been satisfied by the sua sponte vacating of the plea of guilty alone.

While we agree that the Court should not have permitted the defendant to be sent to jail, we think that the District Court should have gone further and should have ordered that not only should the petitioner have been released from custody as he has been, but that in addition, the plea bargain as made should have been strictly enforced.

As the law stands now, a Judge may unilaterally decline to enforce a plea bargain as made notwithstanding the fact that there has been no allegation of deception, fraud or misrepresentation. The plea "bargain" is one-sided.

Frankly, we can see no justification for the limited approach taken by the Court below since we maintain that absent fraud, misrepresentation, or deception, a plea bargain must be enforced as made without exception (Santobello v. New York, supra).

We, of course, recognize also that a voluntary waiver by the defendant would also serve to justify the vacating of a plea bargain. There is no suggestion of waiver here, however.

We specifically call this Court's attention to the incisive dissenting opinion in the Appellate Division, A 83 - A 86.

We must also bear in mind that in view of the fact that the co-defendants' cases had been disposed of prior to Selinkoff's sentence, that he could not have been restored to status quo ante.

Thus it is the position of petitioner that in no event could the Court below compel him to consent to the restoration of dismissed charges. In addition, the most the Trial Court could do sua sponte would be to vacate the pleas of guilty to the crimes which were still open.

We take the further position, however, that the District Court below should have gone further by interpreting the case of Santobello v. New York to mean that absent fraud, deception, or misrepresentation, there should not be a right on the part of either of the contracting parties to a plea bargain, to decline to live up to the unconditional plea bargain as made. Since plea bargaining is so important to the disposition of crowded calendars, it should be applied fairly and without "catch 22's."

POINT II

THE DISTRICT ATTORNEY OF WESTCHESTER COUNTY AGREED TO THE PLEA BARGAIN AND HAD PREVIOUSLY NEVER ALLEGED ANY MISREPRESENTATION, FRAUD OR DECEPTION IN CONNECTION WITH IT. YET THE PROSECUTOR NOW SEEKS TO UNDO THE BARGAIN DESPITE THE LACK OF ANY COGENT REASON JUSTIFYING SUCH ACTION.

Although it is doubted that this fact has escaped this Court's attention, it is appropriate at this juncture to remind this tribunal that the District Attorney of Westchester County was an active participant in the plea bargaining and had never recommended to the Trial Judge that the plea bargain be dishonored. It comes only as an afterthought following the incomprehensible actions of the Trial Judge that the prosecutor has shifted his position.

We maintain that the shift in position by the District Attorney for Westchester County is a direct violation of the holding of Santobello v. New York, since the District Attorney is seeking now to break his own promise.

Frankly, the only fair position which the District Attorney can take is to join in petitioner's attempts to enforce the plea bargain as made since the Court in Westchester County broke faith not only with the defendant but with the District Attorney as well.

We incidentally note that in Point V of the District Attorney's brief as intervenor herein, he alleges that the order to show cause signed by the Court below did not specifically require that notice be served upon the District Attorney pursuant to 28 U.S.C. 2252. There is no doubt however, that the provisions of the order to show cause as to service were complied with. We maintain that since the District Attorney ultimately was notified, that his position really is de minimus.

The fact remains that the District Attorney did submit papers to Judge Bonsal prior to his ultimate determination of the issues. In addition they of course are appearing herein.

POINT III

THE COURT BELOW WAS CORRECT IN GRANTING THE WRIT OF HABEAS CORPUS. THE INTERVENOR IN HIS POINT IV ARGUES THAT THE DISTRICT ATTORNEY CANNOT DEMAND A SUA SPONTE DIRECTION TO VACATE A PLEA OF GUILTY. THE PROSECUTOR THUS AGREES THAT THE WESTCHESTER COUNTY COURT WAS WRONG AND THUS THE GRANTING OF A WRIT OF HABEAS CORPUS IS THE ONLY REMEDY.

The District Attorney of Westchester County, as intervenor herein, agrees with petitioner that a Judge cannot compel the withdrawal of a plea of guilty.

We maintain that by the same token a petitioner cannot be compelled to suffer incarceration unless he "agrees" to with-

draw his plea of guilty. This is tantamount to judicial extortion and we maintain that this Court can never condone such outrageous conduct.

It was acknowledged even by the Westchester County Judge that an unconditional promise had been made to Selikoff at the time of his pleas of guilty that he would not be incarcerated. No "escape clause" was inserted in this promise (A 85).

The Court below recognized quite properly that an injustice had been perpetrated. We do not believe, however, as we stated earlier, that the Court below went far enough since we maintain that the Court below should have ordered that the plea bargain as made be honored.

In the Court below District Judge Bonsal made a finding that a "promise" was actually made (A 134 - citing cases).

The Court below also found that there was a gross inequity of bargaining power between the Court and a defendant (A 135).

We believe that the Court below was correct in granting the writ of habeas corpus since under no circumstances should the State of New York be permitted to incarcerate a defendant under the circumstances of this case. His liberty on bail at least prevents further deprivation of liberty, although we can never return his lost liberty to him.

Judge Bonsal used the approach adopted by Judge Weinfeld in United States ex rel Elksnis v. Gilligan, 256 F. Supp. 244, 249 (S.D.N.Y., 1966) [A 133, 134]. Judge Weinfeld correctly concluded that a Trial Judge could not incarcerate a defendant once that Trial Judge determined he was no longer bound by the promises.

Whether Judge Weinfeld or Judge Bonsal went far enough, however, is something this Court will have to decide.

We maintain that Santobello v. New York, 404 U.S. 257 requires a vacating of the sentence altogether and an enforcement of the promise as made.

POINT IV

PETITIONER SELIKOFF WAS EXPOSED TO DOUBLE JEOPARDY AND HIS DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S DEMAND THAT HE WITHDRAW HIS PLEA OF GUILTY UPON PAIN OF BEING SENTENCED TO INCARCERATION IN SPITE OF THE COURT'S PROMISE TO THE CONTRARY AT THE TIME THE PLEA WAS INTERPOSED. WITHDRAWING THE PLEA WOULD EXPOSE SELIKOFF TO CONSIDERABLE ADDITIONAL JEOPARDY AND PUNISHMENT.

We refer this Court to pages A 35 through A 39 of the appendix which contains the analysis of petitioner's arguments on this aspect of the case.

CONCLUSION

The granting of the writ of habeas corpus should be sustained and affirmed but this Court should make a further determination that the promise of the County Court Judge should be enforced specifically.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner-
Appellee

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA ex rel. IRVING ANOLIK, etc.,

Petitioner-Appellee.

- against -

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 19th *day of* August *19*75*, deponent served the annexed*

Appellee Brief

upon Carl A. Vegari *attorney(s) for*

~~Appellant~~ *in this action, at* Courthouse, 166 Main Street, White Plains, N.Y. 10601

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* of *same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 19th *day of* August *19*75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
IRVING ANOLIK, etc.,

Petitioner-Appellee,

against

COMMISSIONER OF CORRECTION OF THE
STATE OF NEW YORK,
Respondent-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 19th *day of* August *19*75 *at* Two World Trade Center, N.Y., N.Y.

deponent served the annexed Appellee Brief *upon*

Louis Lefkowitz

the Attorney General *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James Steele
Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 19th
day of August *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977